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NO. 87-862

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT VANHERBERT,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The arguments made by counsel opposite, supposedly in response to our various contentions, provide proof positive of what happens when cases are tried before, or appealed to, result-oriented Judges. Indeed, the Statement of Facts, offered by the State's counsel, contains so many

distortions that it provides a good platform for the decision to grant certiorari in this case to spring from.

Included in the distortions referred to is the statement that a "confidential informant" existed. Later proof has shown this asserted person, if one in fact existed, to be anonymous. Moreover, the statement in the Respondent's Brief that "the informant [reported that he] had seen the defendant in possession of cocaine within the past three days" (Brief in Opposition, p. 4) is nowhere to be found in the affidavit. Nor can one find any statement in the affidavit to the effect that "the defendant had two counts of trafficking pending against him ... and a history of selling narcotics" (ibid).

What the affidavit in fact stated was that the unknown source had seen the defendant in possession of what, this

asserted source, merely "believed was cocaine" (see, id., p. 11).

And, even counsel opposite must recognize the allegation that the accused had been previously "arrested [about 9-10 months before] and charged with selling" cocaine from the address involved at most is a make-weight allegation.

Granted, petitioner does maintain the affiant lied. This follows also because no person fitting the descriptive information set forth in the indictment was in this home during the period described, which fact was established not only by the petitioner, but the homeowner as well. Also, contrary to the ad hoc position arbitrarily taken by the Court of Appeals, the defense has continuously maintained that the affidavit, even if everything said therein was true, failed to set forth probable cause.

Proof this is so is most obvious to anyone who simply reads what counsel opposite sets forth as "the substantial basis for concluding probable cause existed" to search this home for cocaine some unknown person supposedly had seen on the premises. Id., 12. And, just as surely any inferred conclusion that the trial judge "found Detective Miksch to be a credible person," at best, is flawed by the fact that it is at odds with, both, the facts and the truth. The man was shown to be just what he is, a perjurer.

I

Responding to our Argument No. I, the State, citing Beck v. Ohio, 379 U.S. 89 (1964), warrantless search case, tells us the affidavit need only convince "a reasonably prudent person of the probability that certain ... items will be found in the place to be searched" (Brief in Opposition, p. 8).

Next the State would simply conjure up as a controlling and dispositive tenet, a truly flawed notion. In other words, the State is convinced that because narcotics can in certain circumstances be easily disposed of, where the search authorized by a warrant is for probable cause, there is no need to comply with any knock-notice requirement.

While we certainly agree that exigent circumstances can justify a forcible, unannounced entry, such circumstances have never been held to automatically exist anytime a search is authorized for narcotics. And, no case where there was no allegation of exigent circumstances in the affidavit can be cited to justify a pre-planned, simultaneous entry into all the outside doors of a home. The upshot of all this is that inasmuch as it was these officers

desire to enter as they did, the reasons for their belief such was necessary at the very least should have been submitted as allegations in the affidavit.

For our part, it is surely not the law that where a search is for narcotics this fact alone provides its own circumstances. Even this is not all, any reasonably well trained police officer should have known better than to enter as these officers did.

The State then argues that our complaint that a general or exploratory search was conducted here is answered by the fact that the Court approved their laundry list of items named as the object of the search. What this prosecutor and the Judges who have considered this case fail to understand is that probable cause to search for any specific object must be set forth in the affidavit. This, of course, means that Judges simply lack the

power to authorize searches for, and the seizure of, property simply because the power to do so is asked for -- the case here.

Counsel then argues that the seizure of the seventy four hundred dollars ($7,400.00) in this case was justified because the "possession of large amounts of money is relevant to prove that the defendant was trafficking in drugs" (Id., 17). What is the fact here is the core basis for the search was said to be some informant's belief that he had only seen, not a sale of cocaine but, some unspecified amount of cocaine in the petitioner's possession. Thus the presence of money in the home cannot so automatically be related to that belief or be seizable on sight.

The question then is, what is it about this money that makes it evidence of any drug transactions? Certainly the

officers' belief in this regard cannot validate the seizure by providing a substitute for probable cause.

II

The State's argument that counsel did not take exceptions to the trial court's failure to articulate a basis for its denial of our suppression is no more valid than the same statement was when made by the Court of Appeals.

III

On the sufficiency issue, more was contended by petitioner than the bald argument that it was not shown that he was in possession of the contraband. Our proof actually established through the testimony of the petitioner's son that the contraband belonged to him and that the petitioner was unaware of its presence on the premises.

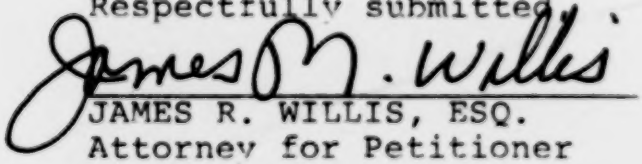
IV

The State's final response is that regardless of how egregious a prosecutor's argument may be, all complaints should be rejected if the proof shows the accused was, after all, guilty. In other words, no harm - no foul. Stated another way, the rights of an accused to be treated fairly by a prosecutor will only be vindicated if a reviewing court is convinced the person victimized is innocent and would have been acquitted had the prosecutor been fair.

CONCLUSION

All of the arguments made above make it manifest that indeed, this is one of those cases that truly ought to be reviewed.

Respectfully submitted,



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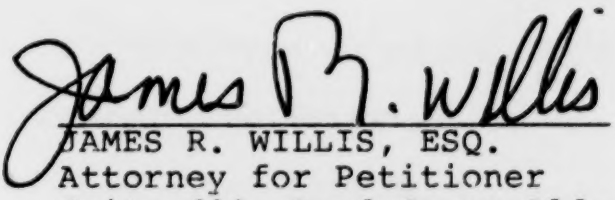
CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief were mailed to the office of Lynn Slaby, Prosecuting Attorney, 53 E. Center Street, Akron, Ohio 44308, this 11th day of January, 1988.



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